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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/763,981	05/23/2001	Amanda Maria Elsome	JMYT-233US	3599
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EXAMINER				
MADSEN, ROBERT A				
ART UNIT		PAPER NUMBER		
1761				

DATE MAILED: 04/27/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action	Application No. 09/763,981	Applicant(s) ELSONE ET AL.	
	Examiner Robert Madsen	Art Unit 1761	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 15 April 2004 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

- a) ☒ The period for reply expires 4 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
- ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on _____. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☐ The proposed amendment(s) will not be entered because:
- (a) ☐ they raise new issues that would require further consideration and/or search (see NOTE below);
 - (b) ☐ they raise the issue of new matter (see Note below);
 - (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 - (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____

3. ☒ Applicant's reply has overcome the following rejection(s): See Continuation Sheet.
4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☒ For purposes of Appeal, the proposed amendment(s) a) ☐ will not be entered or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: none.

Claim(s) objected to: none.

Claim(s) rejected: 1-7,9 and 10.

Claim(s) withdrawn from consideration: none.

8. ☐ The drawing correction filed on _____ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____
10. ☐ Other: _____

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SUPERVISORY PATENT EXAMINER
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Continuation of 3. Applicant's reply has overcome the following rejection(s): The rejection of claims 1-4, 9 and 10 under 35USC 102(b) as being anticipated by Harris et al. (US 5599913).

Continuation of 5. does NOT place the application in condition for allowance because:

- (1) The amendment to the claim 1 amounts to no more than reciting an intended use of the sensor
- (2) None of the claims require a food since applicant has expressed all limitations using alternative language (i.e. claim 1 and 9 merely recite "upon food spoilage or the opening or the compromise of packaging"), and consequently the sensor in combination with a food product, in either group of claims, is never positively recited.

Regarding claims 1,4,5 rejected under 35USC 102(b) as being anticipated by Suto (US 5064576), the claimed sensor is recited in terms similar to that of a device. That is, it performs a function. Applicant is reminded that a claim containing a "recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus if the prior art apparatus teaches all the structural limitations of the claim. Ex parte Masham, 2 USPQ2d 1647 (Bd. Pat. App. & Inter. 1987). Suto teaches the structural limitations of the claim, as well as the functions implied: a metal co-ordinated complex in/on a substrate that upon an opening or comprise of the packaging (i.e. leaking of steam into the package during a steam treatment) undergoes a ligand exchange reaction by binding of the gaseous substance (i.e. steam) to the metal of the complex. Thus, Suto teaches the positively recited limitations of claims 1,4,5, and the rejection made under 35USC 102(b) as being anticipated by Suto (US 5064576) stands.

Regarding, the rejection of claims 1-7,9,10 under 103(a) as being unpatentable over Wolfbeis et al. (US 5407829) in view of Moretti et al. (1988) as evidenced by Dojindo Online, that the motivation provided does not provide a proper prima facie case of obviousness. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Wolfbeis et al. teach identifying the presence sulfur compounds with food packages by observing a change in color of a sensor, and differs only in the particular type of sensor. Moretti et al. also teach identifying the presence sulfur compounds by observing a change in color by using palladium-calcein complexes. Thus the nature of the problem identified in both references (i.e. identifying sulfur compounds) is solved by the same method (i.e. utilizing a sensor that changes color in response to the presence of sulfur compounds). The rejection of claims 1-7,9,10 under 103(a) as being unpatentable over Wolfbeis et al. (US 5407829) in view of Moretti et al. (1988) as evidenced by Dojindo Online stands.